Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

LYNDA CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, Deceased,

Petitioner,

vs.

ANDREW SYSTEMS, INC.

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under what circumstances, if any, may a Motion for New Trial pursuant to Fed.R.Civ.P. 59 be filed for the first time after the Court of Appeals has reversed and remanded?

2. Is a judgment "void" merely because it is premised in part on an erroneous order entered without jurisdiction, such as that granting Judgment as a Matter of Law in the absence of a timely Motion therefor?

3. Does "Entry of Judgment," as defined in Fed.R.Civ.P. 54 and 58, serve to start the running of time for filing of appeals and post-trial motions, including a Motion for New Trial pursuant to Fed.R.Civ.P. 59, where the Judgment is based, in part, on an erroneous order granting Judgment as a Matter of Law without jurisdiction?

4. Does "Entry of Judgment" as used *inter alia* in Fed.R.Civ.P. 50, 52, 59, 60, and Fed.R.Civ.App 4, refer to amendment of a judgment in compliance with an appellate mandate following reversal and remand by the Court of Appeals, so as to allow the filing of post-trial Motions, including a Motion for New Trial pursuant to Fed.R.Civ.P. 59?

5. Do the deadlines for filing of post-trial motions, and appeals or cross-appeals, apply to prevailing parties, or only to parties who have suffered an adverse judgment?

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Crawford v. Andrew Systems, Inc., 119 F.3d 925, 38 Fed.R.Serv.3d 417 (11th Cir.1997) ("*Crawford II*").

STATEMENT OF JURISDICTION

This cause comes before this Honorable Court on Petition for Writ of Certiorari from a determination of the United States Court of Appeals for the Eleventh Circuit upholding the Judgment of the United States District Court for the Northern District of Alabama. The judgment of the Court of Appeals was entered on August 15, 1997. Appellant, Lynda Crawford, timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc on September 5, 1997. The Court of Appeals denied the Petition for Rehearing and Suggestion of Rehearing En Banc on October 27, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

APPLICABLE STATUTORY PROVISIONS

This case turns on application and construction of the following provisions of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, the text of which is reproduced in the appendix hereto:

Fed.R.Civ.P. 50; 28 U.S.C.

Fed.R.Civ.P. 52; 28 U.S.C.
Fed.R.Civ.P. 54; 28 U.S.C.
Fed.R.Civ.P. 58; 28 U.S.C.
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Fed.R.Civ.P. 60; 28 U.S.C.
Fed.R.Civ.P. 62; 28 U.S.C.
Fed.R.Civ.P. 74; 28 U.S.C.
Fed.R.App.P. 4(a)(4); 28 U.S.C.

STATEMENT OF THE CASE

A. The underlying action:

This cause was originally filed in the Circuit Court of Jefferson County, Alabama on April 2, 1993. Defendants removed the case to the United States District Court for the Northern District of Alabama on April 28, 1993, invoking that court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. The Complaint, as amended, stated claims for wrongful death of Lois Vivian Parker Kelley and James Wayne Kelley, and for personal injuries to Jonathan Lucas, a minor. The wrongful death claims were based on theories of negligence of the driver of a commercial vehicle, attributable to his employer by respondeat superior; negligent entrustment by the employer; and other negligence of the employer. The minor's claims have been satisfied and are not at issue in this appeal. The claim of negligence of the driver was not disturbed by the trial court, and is likewise not at issue. Thus neither plaintiff Jonathan Lucas nor defendant Dwayne Davis are parties to this appeal.

The decedents were killed when a flat-bed trailer detached from a commercial vehicle traveling the opposite direction. The driver of the commercial vehicle had knowingly failed to attach the trailer to the van properly, was speeding, and was drinking at the

time of the accident. The trailer was defective and its condition violated Department of Transportation regulations. The driver was utterly unqualified under Department of Transportation regulations; those same regulations placed various affirmative duties on the employer to determine his qualifications prior to entrusting him with a commercial vehicle, as well as to test and train him.

In addition, by reputation and by several specific instances which were witnessed by his supervisors, plaintiff proved that the driver was known by his employer to have been a habitual drunk, generally incompetent, and specifically unable to hitch and tow a trailer with a van. For example, just one week prior to the accident at issue, he had an identical accident on a job site in the presence of his supervisor involving the same van and trailer; that accident was caused by his failure to properly hitch the trailer in precisely the same manner as he failed to do so on the day decedents were killed.

B. Procedural History:

Alabama law provides that the measure of damages in a wrongful death case shall be punitive in nature. Pursuant to Alabama law, the court bifurcated the trial into two parts, one involving negligent entrustment, and one involving the negligence and respondeat superior claims. After the negligence phase, the jury returned a wrongful death verdict in the amount of $2,250,000 for each decedent. The jury then heard proof regarding negligent entrustment. The jury was asked whether they wished to amend their prior award: they increased the award to a total of $4,000,000 for each decedent.

One day after the jury was released, the trial judge *sua sponte* granted Judgment as a Matter of Law to defendants, and

entered judgment on the wrongful death claims in the amount of $2,250,000 for each decedent.

Plaintiff appealed and prevailed. *Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151 (11th Cir. 1994)("*Crawford I*"). The Court of Appeals reversed the trial court's order granting Judgment as a Matter of Law, and instructed the court to enter judgment in conformity with the jury's verdict. There had been no motion for Judgment as a Matter of Law prior to or following the verdict; the court held that the order was improper, and stated that the trial court lacked jurisdiction to order Judgment as a Matter of Law pursuant to Fed.R.Civ.P. 50.

On remand, fourteen months after the verdict and entry of judgment, the defendants moved for the first time for a new trial pursuant to Fed.R.Civ.P. 59, solely on the wrongful death claim as based upon the theory of negligent entrustment, asserting insufficiency of the evidence at trial. The trial court granted that Motion, holding that the amendment of the judgment in accordance with the appellate mandate was a new "judgment" as that term was used in Fed.R.Civ.P. 59, and that the time for post-trial motions began to run again from that time, or alternatively that the filing of the notice of appeal tolled the time for filing a Motion for New Trial. At that hearing, the trial court also suggested that defendants file a motion for summary judgment on the negligent entrustment claim.

Plaintiff filed a Petition for Mandamus with the Court of Appeals for the Eleventh Circuit, challenging the jurisdiction of the court to entertain an untimely Motion for New Trial on April 26, 1995. The Court of Appeals denied that Petition on August 16, 1995, holding that the plaintiff's remedy was appeal from a final decision. The Court of Appeals also questioned whether the deadlines for filing post-trial motions applied to a prevailing party.

Immediately thereafter, the trial court granted summary judgment to the defendants, asserting that the evidence of negligent entrustment was insufficient. Plaintiff again appealed to the United States Court of Appeals for the Eleventh Circuit. *Crawford v. Andrew Systems, Inc.*, 119 F.3d 925 (11th Cir. 1997)("*Crawford II*"). The panel affirmed; the plaintiff's Petition for Rehearing and Suggestion of Rehearing En Banc was denied.

ARGUMENT

A. INTRODUCTION

The panel decision of the Court of Appeals for the Eleventh Circuit is broad-reaching and violates the Rules of Civil Procedure as well as principals of finality of judgments, consolidation of issues for appeal, and carefully crafted rules regarding timing of post-trial motions, appeals, and balancing of the jurisdiction of trial courts and courts of appeals following a judgment.

The panel ruled that it was "... self-evident that when a court of appeals reverses a judgment on the ground that it was unauthorized, the case is left without a judgment until the district court enters one that is authorized by law." *Crawford v. Andrew Systems, Inc.*, 119 F.3d 925, 926 (11th Cir. 1997) ("*Crawford II*"). In the first appeal, *Crawford v. Andrew Systems, Inc.*, 39 F.3d 1151 (11th Cir. 1997) ("*Crawford I*"), the circuit court had held that the entry of Judgment as a Matter of Law under Fed.R.Civ.P. 50 was erroneous in the absence of a timely motion; specifically they held that the trial court lacked jurisdiction to enter that order. *Crawford I*, 39 F.3d 1151. The case was remanded with instructions to conform the judgment to the jury's verdict. In *Crawford II*, the panel held that the lack of jurisdiction to enter the Rule 50 order made the subsequent judgment "void." *Crawford* II,

119 F.3d at 926. Compounding the damaging effects of this ruling on finality of judgments, the panel also held that *no* time limits for post-trial motions[1] would begin to run from a "void" judgment. *Crawford II*, at 926. Taken separately, each holding is troubling; taken together, this erroneous expansion of the definition of voidness and the unprecedented creation of additional remedies for void judgments are a serious threat to finality of judgments.

The panel also approved the holding of the trial court that the time for filing post-trial motions does not apply to a prevailing party; specifically, the decision held that the post-trial deadlines do not apply to a party which prevails on any claim, as to the claim on which they prevailed.[2] *Crawford II*, at 926 fn. 2. This novel exception for prevailing parties[3] destroys the carefully-crafted rules

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1. And presumably the time for appeal as well. The 1963, 1979 and 1991 amendments to the Federal Rules of Civil Procedure created a single point from which to measure post-trial time limits, to provide a single, consistent basis for calculating the deadlines for post-trial motions under Rules 50, 52, 59, 60, 62, and 74, and the time for appeal under Fed.R.App.P. 4(a)(4). They chose as the starting point a ministerial act, clearly defined under Rule 58: the Entry of Judgment by the clerk of the court. Comments to 1993 Amendments to Rule 58, Fed.R.Civ.P. That act is separate from the rendition of judgment by the court, defined by Rule 54. As discussed below, (Argument, Section C, page 16) the time runs from this ministerial act whether or not the underlying judgment is itself void. *See e.g. In re Edwards*, 962 F.2d 641 (7th Cir. 1992)(in absence of timely appeal, judgment could be challenged, if at all, by Motion under Rule 60(b)(4)).

2. The panel further approved the trial court's decision on the merits of the summary judgment. That holding violates Alabama law, in particular the holding in *Keller v. Kiedinger*, 389 So.2d 129 (Ala. 1980)(Alabama adopted § 390 of the Restatement (Second) of Torts; no longer requires combined and concurring negligence). While errors of state law are not properly the basis of a grant of certiorari, should this court grant certiorari, in this case on other grounds, plaintiff raises this issue to preserve it in the event of remand.

3. Rule 50 provides for pleading in the alternative, in part so that the prevailing party can easily raise and preserve any asserted error. Rules 50(c)(2) and 50(d) specifically provide exceptions for a prevailing party, to avoid any likelihood of surprise by ruling of the court or on appeal. The situation raised by the instant appeal falls outside of those narrow

regarding the timing of post-trial motions and the filing of notice of appeal. If, in every case, these deadlines were not to apply to at least one party, the Rules would at least have mentioned that exception; in multi-count litigation, each party is likely to prevail on some claims or theories.

This Court should grant certiorari in order to clarify what constitutes a void judgment; what are the effects of a void judgment; what are the remedies for a void judgment; and also to clarify that the post-trial filing deadlines under Fed.R.Civ.P. 50, 52, 59, 60, 62, and 74 and Fed.R.App.P. 4(a)(4) apply to all parties. The initial judgment entered by the trial court, while wrong, was not made in the absence of subject matter jurisdiction over the case; the court's procedural error in granting Judgment as a Matter of Law on one claim did not render the subsequent judgment "void." The court had jurisdiction over the case, and had jurisdiction to enter a judgment in that case. Mere error, even if of a jurisdictional nature, does not render void any subsequent judgment, unless it fundamentally affects the subject matter jurisdiction of the court. The judgment, based in part on an erroneous order, is no more "void" than any other judgment reversed on appeal. Neither the judgment itself nor of the "entry of judgment" were made "void" by the trial court's error.

Further, even a void judgment, if entered in accordance with Fed.R.Civ.P. 58, triggers the running of the post-trial deadlines. A motion under Rule 59, for example, must be brought not later than ten days from the entry of judgment. Fed.R.Civ.P. 59(b). That deadline cannot be extended. Fed.R.Civ. P. 6. A Notice of Appeal must be filed no later than thirty (30) days from entry of judgment, unless a timely post-trial motion is filed within

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exceptions.

ten days of the entry of judgment. Fed.R.App.P. 4(a)(4). No other case has granted additional time for the filing of post-trial motions or appeals because of the alleged voidness of a judgment. One court has granted additional time where the "entry of judgment" by the clerk was void. *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1976).

Finally, the court should grant certiorari to correct the error made by the trial court and approved by the panel on appeal, in holding that the post-trial filing deadlines do not apply to a "prevailing party." This error should be obvious, but one other court, in *dicta*, made that same error. *Riske v. Truck Ins. Exchange*, 490 F.2d 1079, 1088 fn. 2 (8th Cir. 1974)[4]. The Court should act in order to correct this error in the Eleventh Circuit, and to prevent other courts from lapsing into the same error, to the destruction of the policies of finality of judgments and consolidation of issues for appeal.

B. THE JUDGMENT WAS NOT VOID

In *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), this Court stated the narrow definition of a void judgment: a judgment is void if the judgment is "not merely erroneous, but is beyond the court's power, void, and subject to collateral attack." *Id.*, 308 U.S. at 346; *see also Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *Thompson v. Whitman*, 21 L.Ed. 897, 18 Wall. 457 (1873). Additionally, the lack of personal jurisdiction over a party or actions in violation of

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4. As appellant advised the court of appeals, that *dicta* in *Riske* is not followed even within the Circuit that decided it. The Court of Appeals for the Eighth Circuit has since decided *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cir. 1985), which follows the approach sanctioned by the Rules. It is clear, however, that for some reason, the flawed approach of *Riske* has its adherents.

due process can render a judgment void. *See e.g. Simer v. Rios*, 661 F.2d 655, 663 & fn. 18 (7th Cir. 1981). In the instant action, there is no issue regarding personal jurisdiction, and no remaining issue regarding due process. This appeal turns on the breadth of the definition of voidness with regard to subject matter jurisdiction. As noted by one court struggling with application of this standard to the facts of a specific case, this definition does not indicate how narrow that scope is to be. *Williams v. Brooks*, 996 F.2d 728 (5th Cir. 1993).

Almost all courts which have discussed the voidness of judgments have reiterated that "[a] judgment is not void simply because it is or may have been erroneously decided." *E.g. Hoult v. Hoult*, 57 F.3d 1, 5 (1st Cir. 1987).[5] The most restrictive view of the scope of voidness for lack of subject matter jurisdiction is also the best-reasoned: that a judgment is valid unless the court lacked subject matter jurisdiction over members of the same type class of cases. *United States v. Holtzman*, 762 F.2d 720, 724 (9th Cir. 1985). Appellant urges the adoption of this standard. Professor Moore states the rule as follows:

> ... [O]nly judgments that are totally beyond a court's power to render are void.[6] The concept of void judgments

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5. *See U.S. v. Boch Oldsmobile, Inc.*, 909 F.2d 657 (1st Cir. 1990); *Simer v. Rios*, 661 F.2d 655, 661 (7th Cir. 1981); *Marshall v. Board of Education*, 575 F.2d 417, 422 (3d Cir. 1978); *Chambers v. Armontrout*, 16 F.3d 257, 261 (8th Cir. 1994); *U.S. v. Holtzman*, 762 F.2d 720, 724 (9th Cir. 1985); *V. T. A., Inc. v. Airco, Inc.*, 597 F.2d 220. 224 (10th Cir. 1979); *see also* Annotation "Lack of Jurisdiction, or Jurisdictional Error, as Rendering Federal District Court judgment 'Void' for Purposes of Relief under Rule 60(b)(4) of Federal Rules of Civil Procedure," 59 A.L.R.Fed. 831.

6. Original footnote 2–"Void judgments are those that court had no power to render. See e.g. Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S.Ct. 343, 84 L.Ed. 370 (1939)(bankruptcy proceedings may oust state court of power to foreclose on property, and if state court acts anyway in these circumstances, its order is "not merely erroneous but ... beyond its power,

> is narrowly construed.[7] A judgment is valid, not void, whenever the court that renders it has jurisdiction over the subject matter and the parties.[8] In other words, a judgment is void, and therefore subject to relief under Rule 60(b)(4), *only* if the court that rendered it lacked jurisdiction *or* in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process. (Emphasis in original).[9]

--Moore's Federal Practice, §60.44[1][a] (CD-Rom Edition 1997)

Under this narrow definition, even an erroneous determination by the trial court of its own jurisdiction does not render its subsequent actions "void." *E.g. Stoll v. Gottlieb*, 305 U.S. at 171-72 (1938); *Honneus v. Donovan*, 691 F.2d 1, 2-3 (1st Cir. 1982). Certainly the erroneous rendition of an order under Fed.R.Civ.P. 50 overruling the jury verdict on one of two claims does not make the subsequent judgment void; the trial court had jurisdiction over the case as a whole, and had jurisdiction to enter a judgment on the jury verdict, and/or to enter a judgment which embodies the court's rulings on a valid order pursuant to Fed.R.Civ.P. 50. The court's determination was erroneous. The timing rule violated by the court was "jurisdictional;" the violation did not, however, affect the subject matter jurisdiction of the court

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void, and subject to collateral attack")."

7. Original footnote 3-- "Void judgments narrowly construed. United States v. Berenguer, 821 F.2d 19, 22 (1st Cir. 1987)"

8. Original footnote 4-- "Judgment valid when court has subject-matter and personal jurisdiction. See, e.g., Stoll v. Gottlieb, 305 U.S. 165, 171-172, 59 S.Ct. 134, 83 L.Ed. 104 (1938)... ."

9. Original footnote 5-- "Voidness defined in terms of lack of jurisdiction or violation of due process. U.S. v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)."

to hear the case or to enter judgment.

Several courts of appeals have recognized the need to construe the concept of "void" judgments narrowly, in the interests of finality of judgments. *E.g. U.S. v. Berenguer*, 821 F.2d 19 (1st Cir. 1987), *citing* 7 Moore's Federal Practice, para. 60.25[2]; *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979).

The First Circuit, in *U.S. v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 660-662 (1st Cir. 1990), considered at length the appropriate balance between finality of judgments, motions under Rule 60(b) in general, and the voidness of judgments pursuant to Rule 60(b)(4). The court stated that

> [o]ne of the basic tenets of our system of jurisprudence is that of finality of judgments. The principle of finality is essential to ensure consistency and certainty in the law. This salutary principle is founded upon the generally recognized public policy that there must be some end to litigation.

–Boch Oldsmobile, 909 F.2d 657, 660, *citing Angel v. Bullington*, 330 U.S. 183, 192-93, 67 S.Ct. 657, 662-63, 91 L.Ed. 832 (1947; *Heiser v. Woodruff*, 327 U.S. 726, 733, 66 S.Ct. 853 856, 90 L.Ed. 970 (1947).

These broad principles--(a) that finality of judgments requires a narrow construction of void judgments; (b) that a judgment that is merely erroneous is not void; and (c) that a judgment is valid unless the ruling court lacked jurisdiction over the subject matter of the case, or personal jurisdiction over the parties, or acted in violation of due process--provide some guidance to a court applying them. *U.S. v. Berenguer*, 821 F.2d 19

(1st Cir. 1987). Clarification of these principals would assist those courts in cases where the voidness claimed arises not from a complete lack of subject-matter jurisdiction over the class of claim, but rather from less absolute jurisdictional flaws.[10] As stated by the Seventh Circuit, " not every jurisdictional defect makes an order ... void." *In re Edwards*, 962 F.2d 641 (7th Cir. 1992)(appeal from denial of relief from appealable order in bankruptcy proceedings).

The following decisions of the United States Courts of Appeals are in conflict with the holding of the Eleventh Circuit in this case that the rendition of an order under Rule 50, made without jurisdiction due to the lack of a timely motion, causes the subsequent judgment to be "void."

1st Circuit–*Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1972). This decision recognizes that a "total want of jurisdiction" is required to make a judgment "void." The court recognized that the trial court had jurisdiction over the class of cases, and thus had jurisdiction to act, whether or not the specific act taken is proper, and that injunction, while perhaps erroneous, was not "void."

1st Circuit–*U.S. v. Boch Oldsmobile, Inc.*, 909 F.2d 657 (1st Cir.

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10. The Seventh Circuit struggled with application of these general rules to an allegedly void order. *In re Edwards*, 962 F.2d 641 (7th Cir, 1992):

> "But Guernsey argues that the order is "void," and thus within Rule 60(b)(4), which has no time limit, so we must ask, what does "void" mean? The term is thrown around a lot in law, but it lacks a settled or precise meaning. The standard formulas, such as, a judgment is void "if the court that rendered it lacked jurisdiction of the subject matter or the parties, or if it acted in a manner inconsistent with due process of law, [citations omitted] are not helpful. ... We are left with the practical question, in what circumstances can a civil judgment be set aside without limit of time and without regard to the harm to innocent third parties?"

1990). The court recognized the tension between finality of judgments and the concept of "void" judgments. The court ruled that the movant must show a "total want of jurisdiction" (*citing Lubben, supra*), and held that the actions of the trial court were not "void" in the absence of such a showing.

5th Circuit--*Hill v. McDermott, Inc.*, 827 F.2d 1040 (5th Cir. 1987) recognizes how erroneous decisions can be phrased in terms of jurisdiction, but held that the court must determine whether the question is actually one of jurisdiction, or merely a restatement of claimed error which **should have been raised on direct appeal**. The court stated that as "Hill **does not contend that the district court could not entertain Jones Act claims** or that personal jurisdiction over either party was lacking," that the judgment was not void. *Id.*, at 1043.

7th Circuit--*Ben Sager Chemicals Int'l, Inc. v. Targosz & Co.*, 560 F.2d 805 (7th Cir. 1977) The court held that only the usurpation of power by rendering a judgment beyond the scope of the authority granted the court by its creators could cause a judgment to be void for lack of subject matter jurisdiction; a judgment is not void if the court has jurisdiction over the class of cases which includes the case at issue.

8th Circuit--*Kansas City S.R. Co. v. Great Lakes Carbon Co.*, 624 F.2d 822 (8th Cir.), *cert. denied* 449 U.S. 955, 101 S.Ct. 363, 66 L.Ed.2d 220 (1980). The court held that lack of subject matter would only render a judgment "void" where there was a "plain usurpation of power" by the court. The court of appeals held that only extending jurisdiction beyond the court's grant of jurisdiction was sufficient to render it judgment "void." The court's judgment is valid unless the court decided a case which was one of a class of cases over which it lacked subject matter jurisdiction.

9th Circuit–*U.S. v. Holtzman*, 762 F.2d 720, 724 (9th Cir. 1985) held that an injunction under the Clean Air Act was not void, whether or not terms of the injunction exceeded the court's power granted by that Act. The court of appeals held that the trial court had jurisdiction of the case under the Act, and had power to enter an injunction; whether the specific terms thereof were allowed under statute does not rise to level to render the injunction "void" and thus to allow collateral attack.

10th Circuit–*V. T. A., Inc. v. Airco, Inc.*, 597 F.2d 220, 226 (10th Cir. 1979) "It is quite true that a judgment may be collaterally attacked under 60(b)(4) when the rendering court was powerless to enter it. But this remedy is not available to correct mere legal error. The alternative would be to upset the delicate balance between finality of judgment and justice that Rule 60(b) seeks to maintain."

In addition, Plaintiff asserts that the decision of the panel below, that the rendition of an order under Fed.R.Civ.P. 50 without jurisdiction causes any subsequent judgment embodying that order to be "void," is in violation of the definitions and rules described above, and each case which follows those general rules, including the following cases:

U.S. v. Berenguer, 821 F.2d 19 (**1st Cir**. 1987).

Precision Etchings & Findings, Inc. v. LGP Gem, Ltd., 953 F.2d 21 (**1st Cir**. 1992).

Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 400 (**7th Cir**. 1986).

In re Edwards, 962 F.2d 641 (**7th Cir**. 1992).

Chambers v. Armontrout, 16 F.3d 257, 261 (**8th Cir**. 1994).

Tomlin v. McDaniel, 865 F.2d 209, 210 (**9th Cir**. 1989)(Plaintiff did not assert lack of jurisdiction, or violation of due process, so judgment was not "void.") *citing Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir.1985), *and* 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2862, at 198-200 (1973).

Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica, 614 F.2d 1247 (**9th Cir**. 1980)

Some courts have apparently joined the Eleventh Circuit in holding that an order, taken without jurisdiction, can be attacked as void under Rule 60(b)(4); however, those courts do not hold that the void action renders all subsequent actions void, nor that time limits cease to run from the assertedly void act. *See e.g. In re Taylor*, 884 F.2d 478 (9th Cir. 1989)(appeal from decision in bankruptcy proceeding. It appears that this decision might be treated under applicable procedure as an appealable order, or judgment.); *Compton v. Alton S.S. Co.*, 608 F.2d 96 (4th Cir. 1979)(in Jones Act case, court lacked authority under a union contract--as opposed to articles of hire--to grant remedy under penalty provisions of 46 U.S.C. § 596.).

In addition, the holding of the panel in the instant appeal is contrary to the decision of the United States Supreme Court in *Stoll v. Gottlieb*, 305 U.S. 165, 171-72, 59 S.Ct. 134, 137, 83 L.Ed. 104 (1938), (a judgment is valid unless the rendering court lacks subject matter jurisdiction over the case or personal jurisdiction over the parties), and *Thompson v. Whitman*, 21 L.Ed. 897, 18 Wall. 457 (1873)(Judgment void only for lack of jurisdiction *in rem*, *in personam*, or over the case) The court below lacked jurisdiction to grant Rule 50 relief in the absence of a timely motion; the judgment which followed that order was not

made "void" by that error.

C. DEADLINES RUN FROM ENTRY OF ANY JUDGMENT

The expansion of the definition of voidness is troubling on its own, but the combination of that ruling with the holding that the entry of an assertedly "void" judgment does not begin the running of the post-trial deadlines threatens to destroy the careful balance between finality and fairness, certainty of jurisdiction, and clarity of the rules, which were the goal of the 1963, 1979 and 1993 amendments to the Federal Rules of Civil Procedure.

There is no support for the concept, asserted by the Court of Appeals for the Eleventh Circuit, that post-trial time limits do not run from a void judgment.[11] The panel cited none in its opinion. *Crawford* II, 119 F.3d 925. Under the Rules, a party may challenge a void judgment in the same manner as any other: by timely post-trial motion or by timely direct appeal. In addition, Rule 60(b)(4) provides for a Motion for Relief from a Judgment, which may be filed within a reasonable time. Fed.R.Civ.P. 60(b)(4). Courts construing that provision have held consistently that a motion under that provision may be made at any time.[12]

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11. There is some authority for the proposition that where "Entry of Judgment" is void, that ministerial act does not trigger the running of time. *Butler v. Stover Brothers Trucking Co.*, 546 F.2d 544 (7th Cir. 1976)(entry of judgment is ministerial act, void where beyond *clerk's* authority: time for appeal does not run). The Clerk of the Court does not have discretion to enter only those judgments which he deems to be valid. Fed.R.Civ.P. 58.

12. *See e.g. Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646 (5th Cir. 1988); *Collins v. Foreman*, 729 F.2d 108 (2nd Cir. 1984); *In re Edwards*, 962 F.2d 641 (7th Cir. 1992); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21 (1st Cir. 1992); *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir 1987); *Recreational Properties, Inc. v. Southwest Mortg. Service Corp.*, 804 F.2d 311 (5th Cir 1986); *U.S. v. Boch Oldsmobile, Inc.*, 909 F.2d 657 (1st Cir. 1990).

Additionally, the common law allows a void judgment to be collaterally attacked in a separate action at any time. *E.g. Williams v. State of N.C.*, 325 U.S. 226, 229, 65 S.Ct. 1092, 89 L.Ed.1577 (1945). Plaintiff has been unable to locate a single case which allows the filing of any other form of challenge to a void judgment--particularly a Motion for New Trial--without regard to post-trial deadlines, simply because the judgment was "void," whether or not the alleged voidness of the judgment was the basis of the challenge. If that were the law, there would have been no need to draft Rule 60(b)(4).

The panel in *Crawford II* held that after the appellate mandate of *Crawford I*, "the case is left without a judgment until the district court enters one that is authorized by law." *Crawford II*, 119 F.3d 925, 926. There was, however, a direct appeal taken from that initial judgment. The judgment was effective as a final judgment for the filing of an appeal or cross-appeal; if the entry of the first judgment was of no effect whatsoever, plaintiff could not have prosecuted that direct appeal, and the court of appeals could not have rendered a valid decision on that appeal. In particular, the court of appeals could not have found proper the acceptance of benefits under a portion of that judgment. *Crawford I*, 39 F.3d 1151 (acceptance of proceeds of one claim does not bar appeal from same judgment on separate claim). Deadlines ran from that judgment for all post-trial motions. The panel in *Crawford II* apparently asserts that a second, complete opportunity arises on remand to file post-trial motions. Defendants have never questioned the jurisdiction of the court of appeals to render its judgment in the first appeal.

Few courts have questioned the effect of an allegedly void judgment on the timing of post-trial motions. The cases which have discussed challenges to a void judgment in the context of other remedies all indicate that the other remedies--and their time

limits--remain in place. These cases are all contrary to the holding of the Eleventh Circuit in the instant appeal, which held that a void judgment (or at least a void order) automatically supplants all post-trial time limits.

The First Circuit, in *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1972), recast the government's challenge to a void judgment as a motion under Rule 60(b)(4). The court held that "Rule 60 provides the only avenue of relief from final civil judgments other than by appeal or independent action." *Id.* at 648. Under the Eleventh Circuit's approach, if a judgment is void, ANY motion can address the issue of voidness; that question would become a preliminary issue, determination of which would determine the timeliness of the motion, prior to addressing its merits.

In *U.S. v. Berenguer*, 821 F.2d 19 (1st Cir. 1987), the court upheld the trial court's holding that motions filed more than a year after entry of judgment under Rule 60(b)(1) and (b)(6) were untimely. The court then addressed the Rule 60 (b)(4) motion. Though the court ultimately held that the judgment was not void, the analysis of the motion under 60(b)(4) in the context of other remedies makes clear that the question of voidness of the judgment does not affect the timeliness of any other post-trial motion.

More recently, in *U.S. v. Boch Oldsmobile, Inc.*, 909 F.2d 657 (1st Cir. 1990), the First Circuit has made a very scholarly, detailed analysis of the timeliness of post-trial motions, including a motion under Rule 60(b)(4). The court discussed whether the Rule 60(b)(4) motion was filed within "a reasonable time" of entry of the judgment, and held that it was not. The court nonetheless held that the judgment was not void; if it had been void, they stated, the Rule 60(b)(4) motion would have been timely.

The Seventh Circuit, has similarly held that, after the time for appeal has run, a judgment could be challenged, if at all, by Motion under Rule 60(b), and further that once the time limit for other 60(b) motions had run, only a motion under Rule 60(b)(4) remained timely. *In re Edwards*, 962 F.2d 641, 643-644 (7th Cir. 1992).

The Ninth Circuit, in *Meadows v. Dominican Republic*, 817 F.2d 517, 521-22 (9th Cir 1987), held that a Motion for Relief filed under Fed.R.Civ.P. 60(b)(1) was untimely, while also finding that the Motion under Fed.R.Civ.P. 60(b)(4) was timely. Specifically, the court recognized that the motion under 60(b)(1) was subject to a one year limit or a reasonable time, whichever was less, while the 60(b)(4) motion was subject to no time limit.

In *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992), the Ninth Circuit again held contrary to the position taken by the Eleventh Circuit on the running of time from entry of a void judgment. The court held that

> It is true that appellant might have more properly moved the district court for relief from the proceedings pursuant to Fed.R.Civ.P. 60(b)(4) on the grounds that the proposed settlement was void as to him. [Footnote omitted] However, in the context of the October 15 hearing, we find no barrier to construing what was done as in effect a 60(b)(4) motion made pursuant to that provision.

Id., at 700. If the Eleventh Circuit was correct, there was no need for the Ninth Circuit to re-cast the motion as one under Rule 60(b)(4) in order to reach it out-of-time.

The Fifth Circuit, in *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646 (5th Cir. 1988) the court of appeals recognized that, unlike other post-trial remedies, "there is

generally no timeliness requirement applicable to a Rule 60(b)(4) motion." *Id.*, at 649, *citing* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862 at 197 (1973). The court also discussed the position taken by Professors Moore and Lucas, that in certain egregious circumstances, a motion under Rule 60(b)(4) may be untimely. *Bludworth Bond*, 841 F.2d at 649 fn.6, *citing* 7 J. Moore & J. Lucas, Moore's Federal Practice, § 60.25[4] at 60-242 (2d ed. 1987).

In *Williams v. Brooks*, 996 F.2d 728 (5th Cir. 1993), the Fifth Circuit cautioned that

> simply because a court lacks jurisdiction does not mean that a party should entirely ignore that court's dismissal, as the appellants did for many months in this case. Rather, the proper course to have taken would have been to timely appeal the district court's dismissal on the merits on the ground that the court lacked jurisdiction to dismiss the case.

The court held, however, that "in the particular circumstances presented here, failure to appeal the original dismissal within the ordinary thirty-day period required by Rule 4" did not preclude a motion under Rule 60(b)(4). The court thus underscored that only a motion under Rule 60(b)(4) could be filed out-of-time.

D. REMEDIES FOR VOID JUDGMENT

The panel decision offers defendants a broad-reaching remedy for the "void" order granting Judgment as a Matter of Law. The panel asserts that because the trial court ordered Judgment as a Matter of Law without jurisdiction, no post-trial time limits ran from Entry of the Judgment which followed that order. The panel holds that the defendants therefore are free, following remand, to file any post-trial motion. *Crawford II*, 119

F.3d 925, 926. This novel remedy is particularly surprising because there is no need for it.

As discussed above, a void judgment can be challenged by timely appeal or by timely post-trial motion, as well and Rule 60(b)(4) motion and by collateral attack without time limit. The defendants below were in no worse position than any other litigant; the Rules provide sufficient opportunities for a prevailing party to preserve issues and alleged errors.[13] The panel ignores the law on this point, and also ignores the fact that the allegedly void judgment was challenged--successfully--by the plaintiff in a timely direct appeal with no cross-appeal by defendants. (*Crawford I*, 39 F.3d 1151) The remedy for a void judgment is directed to overturning that judgment; to the extent that the judgment (and not the order) was void, that remedy was granted in *Crawford I*. That remedy lead to amendment of the judgment.

The original judgment was in favor of plaintiff in the amount of $2,250,000 for each decedent; the amended judgment was a judgment for the full amount awarded by the jury. There is no need for the creation of further remedies; if there were, such broad-reaching amendment would not be the proper role of a single court of appeals, but of the drafters of the Rules of Civil Procedure as part of a comprehensive change in the Rules. These defendants do not seek a remedy to the voidness of any action by the trial court: they were not adversely affected by the trial court's order; they benefited from it and did not challenge it. Rather, the defendants seek to bootstrap their untimely challenges to other aspects of the judgment onto the allegedly void order.

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13. For example, Rules 50(c)(2) and 50(d) provide additional protection for a prevailing party; the party may also cross-appeal, to timely raise any perceived errors as appellee. In the instant case, the defendants lost the verdict on both counts, lost the judgment on one count, and had notice of the weaknesses in the court's *sua sponte* order on the other count.

Could the defendants in this case simply have filed a Rule 60(b)(4) motion, or could the trial court have treated their untimely motion under Rule 59 as a motion for relief from a void judgment under Rule 60(b)(4)? Clearly, they could not. Defendants did not seek relief from a void judgment: that had already been accomplished by the reversal on appeal by plaintiff. *Crawford I*. There was no longer an arguably void judgment to challenge. Defendants instead wanted to avoid aspects of the verdict that were not arguably void; any attempt to do so would only have been proper on direct appeal, and their efforts therefor were untimely.

E. POST-TRIAL TIME LIMITS APPLY TO ALL PARTIES

The trial court held that the Motion for New Trial, filed following remand some fourteen months after entry of judgment, was timely; it held that the judgment following remand was the first judgment against the defendants and that the post-trial time limits apply only to adverse judgments. The panel in *Crawford II* agreed. *Crawford II*, at 926 fn 2.

The drafters of the Federal Rules of Civil Procedure amended the Rules to provide a single, uniform point in the litigation from which to measure all post-trial deadlines, including the time for appeal. They chose a ministerial act that could be easily identified with certainty--the Entry of Judgment by the Clerk, as defined in Rule 58. All of the following rules now calculate their deadlines from the date of the Entry of Judgment, as defined in Rule 58[14]:

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14. This uniformity has been the purpose of the 1963, 1993 and 1995 amendments to the Rules. Comments to 1963, 1993 and 1995 amendments to Rules 50, 54, 58, 59, and 60. The Eleventh Circuit ruling will have a broad effect on all of these Rules, and on Fed.R.Crim.P. 33 (New Trial in criminal cases). The Criminal Rules also use the entry of

Fed.R.App.P. 4(a)--notice of appeal measured from entry of judgment;
Fed.R.App.P. 4(a)(4)--various motions which can halt the time for appeal;
Fed.R.App.P. 4(a)(6)--deadline to reopen time for appeal where no notice given;
Fed.R.Civ.P. 50(b)--Motion for Judgment as a Matter of Law;
Fed.R.Civ.P. 52(b)--Motion to Amend or to Make Additional Findings;
Fed.R.Civ.P. 54 (b)(2)--Motion for Attorneys Fees;
Fed.R.Civ.P. 59(b)-- Motion for New Trial, made pursuant to 59(a);
Fed.R.Civ.P. 59(d)--New Trial on Court's own motion;
Fed.R.Civ.P. 59(e)--Motion to Alter or Amend Judgment;
Fed.R.Civ.P. 60--Motion for Relief from Judgment, if made within 10 days, will be effective under Fed.R.App.P. 4(a)(4) to halt time for appeal;
Fed.R.Civ.P. 60(b)(1-3)--Motion for Relief from Judgment,
Fed.R.Civ.P. 60(b)(4-6)--deadline, with date action taken;
Fed.R.Civ.P. 62(a)--automatic stay of execution for ten days after entry of judgment.
Fed.R.Civ.P. 74(a)--Appeal from decision of Magistrate Judge.

These deadlines are drafted to reflect general application to all cases and litigants. "Any motion for a new trial shall be filed no later than 10 days after entry of the judgment." Fed.R.Civ.P. 59(b). Certainly, if at least one litigant in every case did not have to file at that time, the Rule would mention that. *See also* Fed.R.Civ.P. 6(b).

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judgment for deadlines.

Contrary to the trial court's holding, there exists no blanket exception for a party who prevails on one or more of the claims in a case. The **only** exceptions are those provided in Rules 50(c)(2) and 50(d). Rule 50(d) provides that a party who wins the verdict, and who then defeats a Motion for Judgment as a Matter of Law granted against him, can seek a new trial "as appellee" from the court of appeals for the first time, if he loses on appeal. This Rule focuses on truly innocent error by litigants who had no reason to consider the weakness of their claims: it does not apply as here to one who had never filed a dispositive motion, had not challenged the jury instructions on the elements and burden or proof, who lost the verdict and did not move for Judgment as a Matter of Law or New Trial. Defendant knew or should have known prior to the deadline of the appeal, of the questions regarding the validity of the order under the Rule 50, and of the need to preserve its rights. That litigant had every chance to protect their own interests by timely filing an alternative motion for new trial, or by cross-appeal.

The Rules recognize that often only one party will **wish** to challenge the result of a case, but the Rules provide the opportunity for all parties to protect their rights in the same ways, by filing alternative post-trial motions, and filing a cross-appeal. Whether or not to act to preserve perceived errors is a conscious tactical decision; it is not cause to amend the Rules.

The Court of Appeals for the Fifth Circuit has twice rendered decisions contrary to that taken by the Eleventh Circuit in this case. *Arenson v. Southern University Law Center,* 43 F.3d 194, 197-98 (5th Cir. 1995); *Johnstone v. American Oil Co.*, 7 F.3d 1217 (5th Cir. 1993). In *Arenson*, as in the case at bar, the appellant won a jury verdict that was set aside by the trial court which granted judgment as a matter of law. The appellees, however, had moved for a new trial in the alternative, but the trial court did not rule on the new trial motion and the appellee did not

press the court for a ruling on the new trial motion after entry of judgment as a matter of law. Similarly, appellee did not raise on appeal the issue that the trial court had not ruled on the motion for a new trial. Like the case at bar, the trial court's judgment as a matter of law was reversed. The Fifth Circuit held that the right to a new trial was lost and could not be resuscitated by "rebirth."

In *Johnstone*, 7 F.3d at 1224, the jury returned a verdict for plaintiff, and the verdict-loser moved for a Judgment as a Matter of Law and alternatively for a new trial pursuant to Rule 50. The court granted the Judgment as a Matter of Law and set aside the jury verdict. Again, the trial court did not rule on the alternative motion for a new trial. The movant neither pressed the court for a ruling nor raised the issue on appeal, and was thereby considered by the Court of Appeals for the Fifth Circuit to have abandoned the issue.

Similarly, the Seventh Circuit has considered whether a Motion for New Trial, timely filed but not decided prior to appeal remained viable. That circuit likewise held that the right to consideration of that motion for new trial was waived following remand. *Oberman v. Dun & Bradstreet*, 507 F.2d 349 (7th Cir. 1974); *Vera Cruz v. Chesapeake & O.R.R.*, 312 F.2d 330 (7th Cir.), *cert. denied* 375 U.S. 813, 84 S.Ct. 44, 11 L.Ed.2d 49 (1963).

The rule followed by the Fifth and Seventh Circuits is premised in policies of finality of judgments, and the consolidation of issues in a single appeal. As the Fifth Circuit stated,

> [t]his case, in which the parties have experienced an extra appeal and trial, exemplifies the delay and waste of judicial resources that can occur if parties are allowed to resuscitate dormant motions for new trial after the appeals court has once considered a judgment.

Arenson, at 197. Both circuits rejected the efforts of litigants to allow the district court to render moot the ruling of the court of appeals. Both courts recognized waiver; they assert that a litigant who prevails on JNOV must nonetheless raise and prosecute any request for a new trial in the alternative, as provided by the rules. In each of those case, the litigants had timely filed their motions for new trial; they were, therefore, far more deserving and less dilatory than are the defendants herein.

CONCLUSION

Plaintiff requests this Honorable Court to grant Certiorari in order to review the decision of the Court of Appeals for the Eleventh Circuit on the questions presented herein. Plaintiff asserts that (1) the definition of "void" for judgments is more narrow and more restrictive than that applied by the Eleventh Circuit and by some other courts of appeals; (2) that post-trial deadlines run from "Entry of Judgment" regardless of the validity of the orders or judgments entered; and (3) that the post-trial deadlines, particularly that for a motion for new trial, apply to all litigants, and not only to the party(-ies) suffering an "adverse" judgment.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 1998, a copy of the above and foregoing has been served on all parties to this proceeding by hand delivering three copies of same to the following:

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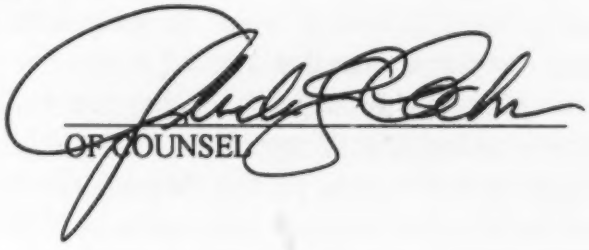

OF COUNSEL

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

CRAWFORD v. ANDREW SYSTEMS, INC.

A. STATUTES:

Fed.R.Civ.P. 50	28 U.S.C.	1a
Fed.R.Civ.P. 52	28 U.S.C.	2a
Fed.R.Civ.P. 54	28 U.S.C.	3a
Fed.R.Civ.P. 58	28 U.S.C.	5a
Fed.R.Civ.P. 59	28 U.S.C.	6a
Fed.R.Civ.P. 60	28 U.S.C.	7a
Fed.R.Civ.P. 62	28 U.S.C.	8a
Fed.R.Civ.P. 74	28 U.S.C.	10a
Fed.R.App.P. 4	28 U.S.C.	12a

B. JUDGMENTS & ORDERS

OPINION of District Court, dated January 14, 1994
Granting Judgment as a Matter of Law.....16a

JUDGMENT of District Court, dated January 14, 1994.....18a

OPINION of Court of Appeals for the Eleventh Circuit,
dated December 8, 1994
Reversing Judgment rendered by District Court.....19a

ORDER of Court of Appeals for the Eleventh Circuit,
dated February 22, 1995
Denying Appellee's Motion for Rehearing and
Suggestion of Rehearing En Banc.....26a

MANDATE of Court of Appeals for the Eleventh Circuit,
dated March 13, 1995.....27a

AMENDED JUDGMENT by District Court,
dated March 29, 1995
In accordance with Mandate of Court of Appeals....29a

ORDER of District Court, dated April 12, 1995
Granting Motion for New Trial.....30a

OPINION of Court of Appeals for the Eleventh Circuit,
dated August 16, 1995
Denying Petition for Mandamus.....32a

OPINION of District Court, dated October 5, 1995
Granting Summary Judgment on Negligent
Entrustment.....33a

ORDER of District Court, dated October 5, 1995
Granting Summary Judgment.....36a

ORDER of District Court, dated December 11, 1995
Denying Plaintiff's Motion to Reconsider.....37a

NOTICE OF APPEAL filed by Plaintiff,
dated January 8, 1996.....39a

OPINION of Court of Appeals for the Eleventh Circuit,
dated August 15, 1997
Affirming District Court.....40a

ORDER of Court of Appeals for the Eleventh Circuit,
dated October 27, 1997
Denying Plaintiff's Motion for Rehearing and
Suggestion of Rehearing En Banc.....44a

MANDATE of Court of Appeals, dated November 4, 1997
Affirming District Court.....46a

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted,

the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on

oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) Judgment on Partial Findings. If during a trial without a jury a party has been gully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not

contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be

proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall agford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. s 1927.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a

decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party

has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,

inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., s 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions--Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of

this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 74. Method of Appeal From Magistrate Judge to District Judge Under Title 28, U.S.C. § 636(c)(4) and Rule 73(d)

(a) When Taken. When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U.S.C. § 636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise

prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b);
(2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

An interlocutory decision or order by a magistrate judge which, if made by a district judge, could be appealed under any provision of law, may be appealed to a district judge by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.

Upon a showing of excusable neglect, the magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.

(b) Notice of Appeal; Service. The notice of appeal shall specify the party or parties taking the appeal, designate the judgment, order or part thereof appealed from, and state that the appeal is to a judge of the district court. The clerk shall mail copies of the notice to all other parties and note the date of mailing in the civil docket.

(c) Stay Pending Appeal. Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security.

(d) Dismissal. For failure to comply with these rules or any local rule or order, the district judge may take such action as is deemed appropriate, including dismissal of the appeal. The district judge also may dismiss the appeal upon the filing of a stipulation signed by all parties, or upon motion and notice by the appellant.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.--

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a)

when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeal in a Criminal Case.--In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later.

This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for arrest of judgment;

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may--before or after the time has expired, with

or without motion and notice--extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed.R.Crim.P. 35(c), nor does the filing of a motion under Fed.R.Crim.P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) Appeal by an Inmate Confined in an Institution.--If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. s 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

LYNDA CRAWFORD, as Administratrix, and CYNTHIA LUCAS, as Mother and Next Friend of JONATHAN LUCAS, Plaintiffs;	)	
v.	)	No. CV 93-P-840-S
ANDREW SYSTEMS, INC. and DWAYNE DAVIS Defendants.	)	

OPINION

Dwayne Davis was driving a van on an interstate highway and towing an empty flat-bed trailer. The trailer separated from the van, crossed the median, and struck a vehicle traveling in the opposite direction, which was occupied by Lois and Wayne Kelley and the infant, Jonathan Lucas. The Kelleys were killed, and Jonathan was injured. This case was brought by the Administratrix of the Kelleys' estates under Alabama's wrongful death statute and by Jonathan's mother for his personal injuries. The defendant Andrew Systems, Inc., as Davis' employer and the owner of the van and trailer, acknowledged that is was legally responsible for Davis' conduct; and, indeed, the defendants admitted that the accident was caused by from Davis' negligence in using the wrong-sized "ball" on the trailer hitch.

The plaintiffs' claims against Andrew Systems were based not only on respondeat superior but also on "negligent entrustment." The law of Alabama appears to be that the acknowledgment by the employer of responsibility for the actions of its employees does not necessarily bar an alternative claim for negligent entrustment. Bruck v. Jim Walter Corp., 470 So.2d 1141 (Ala. 1985).

The jury returned verdicts of $2,250,000 in punitive damages in

favor of each of the two estates and $100,000 in compensatory damages for Jonathan's injuries. After hearing additional evidence concerning Davis' prior driving record, training, and habits, admissible only on the entrustment theory, the jury increased its award of punitive damages to $4,000,000 with respect to each of the two wrongful death claims. For decision at this time is whether the court should direct entry of judgment based on the first verdict of, as to the death claims, on the second verdict.

A negligent entrustment claim depends upon evidence not only that there was negligence in entrusting the vehicle to a person whose incompetence was known or should have been known, but also that this incompetence was a proximate cause of the accident. See Keller v. Kiedinger, 389 So.2d 129 (Ala. 1980); Rush v. McDonell, 214 Ala. 51, 106 So. 178 (1925). In this case, any incompetency of Davis that was known or should have been known to Andrew Systems would not have affected the cause of this accident; namely, the failure to properly attach and safeguard the connection between the van and trailer. There is no evidence to indicate that Davis' competency to secure trailers to motor vehicles has ever been subject to question, much less that Andrew Systems was aware or should have been aware of any deficiency in that ability. To the contrary, the evidence was without dispute that Davis on earlier occasions had towed a trailer -- indeed, this trailer behind this van -- for Andrew Systems without any problems.

Accordingly -- and without venturing into the legal thicket as to whether punitive damages under Alabama's wrongful death statute for negligent entrustment can exceed damages based on the wrongful conduct of the person driving the vehicle -- the court concludes that the second verdict should be set aside for insufficiency of evidence and that judgment should be rendered in accordance with the original verdict.

Attached is a form of judgment that the Clerk is directed to enter.

This the 14th day of January, 1994.

(Signed) Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LYNDA CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, Deceased, et al.

Plaintiffs; **v s .**

No. CV 93--P-840-S

ANDREW SYSTEMS, INC. and DWAYNE DAVIS,

Defendants.

JUDGMENT

It is ADJUDGED as follows:

1. The plaintiff Lynda Crawford, as Administratrix of the Estate of Lois Vivian Parker Kelley, deceased, shall have and recover of the defendants, Andrews Systems, Inc., and Dwayne Davis, the sum of $2,250,000.

2. The plaintiff Lynda Crawford, as Administratrix of the Estate of James Wayne Kelley, deceased, shall have and recover of the defendants, Andrews Systems, Inc., and Dwayne Davis, the sum of $2,250,000.

3. The plaintiff, Cynthia Lucas, suing as mother and next friend of Jonathan Lucas, a minor, shall have and recover of the defendants, Andrews Systems, Inc., and Dwayne Davis, the sum of $100,000.

4. Costs are taxed against the defendants.

This is the 14th day of January, 1994.

(Signed) Robert L. Duncan, Jr.
Clerk

Approved as to form:
(Signed) Sam C. Pointer, Jr., United States District Judge

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

39 F.3d 1151
31 Fed.R.Serv.3d 338
(Cite as: 39 F.3d 1151)

Lynda CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley,
and James Wayne Kelley, deceased; Cynthia Lucas, as Mother and next friend of
Jonathan Lucas, a minor child, Plaintiffs-Appellants,
v.
ANDREW SYSTEMS, INC.; Dwayne Davis, Defendants-Appellees.
No. 94-6064.
United States Court of Appeals,
Eleventh Circuit.
Dec. 8, 1994.

In personal injury action arising out of motor vehicle accident, negligent entrustment claim was severed from respondeat superior claim, and plaintiffs were granted judgment as a matter of law on respondeat superior claim. Following trial on entrustment claim, and after jury returned verdict increasing its award of punitive damages, the United States District Court for the Northern District of Alabama, No. CV-93-P-840-S, Sam C. Pointer, Jr., Chief Judge, sua sponte set aside verdict for insufficient evidence, and plaintiffs appealed. The Court of Appeals, Barkett, Circuit Judge, held that: (1) plaintiffs' withdrawal of funds paid into court by defendants pursuant to first verdict did not bar appeal from District Court's posttrial ruling following second verdict, and (2) District Court could not sua sponte rule that evidence supporting verdict was legally insufficient.
Reversed and remanded.

[1] FEDERAL COURTS k544
170Bk544
Under federal common law, acceptance of benefits or accord and satisfaction doctrine did not bar plaintiffs in personal injury action from

appealing verdict on negligent entrustment claim even though plaintiffs had withdrawn funds deposited by defendants pursuant to jury's previous verdict on respondeat superior claim; part of judgment appealed from was separate and distinct from part that was satisfied, and there was no question that amount of first judgment was uncontested.

[2] FEDERAL CIVIL PROCEDURE k2605.1
170Ak2605.1
In personal injury action, district court could not sua sponte set aside jury verdict in plaintiffs' favor on grounds of evidence insufficiency; defendant never made motion for directed verdict, either prior to submission of case to jury or after jury returned its verdict, and plaintiffs thus had no notice of, and no opportunity to address or cure, possible insufficiencies in evidence. Fed.Rules Civ.Proc.Rules 50, 50 note, 28 U.S.C.A.

*1151 Glenda C. Cochran, Sandra L. Vinik, Birmingham, AL, for appellants.
Turner B. Williams, Charles E. Sharp, Birmingham, AL, for appellees.
Appeal from the United States District Court for the Northern District of Alabama.

Before CARNES and BARKETT, Circuit Judges, and JOHNSON, Senior Circuit Judge.

BARKETT, Circuit Judge:
Plaintiffs-Appellants Lynda Crawford (administratrix of the estates of decedents Lois Vivian Parker Kelley and James Wayne Kelley) and Cynthia Lucas (mother and Next Friend of minor Jonathan Lucas) appeal from a decision of the United States District Court for the Northern District of Alabama. The district court, in the absence of a motion for a directed verdict, granted a judgment notwithstanding the verdict ("JNOV"). Appellants argue that the district court improperly granted the JNOV. We agree and reverse.

*1152 This case concerns a motor vehicle accident which occurred on Interstate Highway 65 in Alabama on September 26, 1992. Defendant-Appellee Dwayne Davis ("Davis") was driving a tractor-trailer

owned by Defendant- Appellee Andrew Systems ("Andrew Systems") when the trailer became unhitched from the van, traveled across the median strip separating the northbound and southbound lanes of Interstate 65 and struck the automobile of Lois and John Kelley. The collision caused the deaths of Lois and John Kelley, and serious injury to their passenger Jonathan Lucas, a minor.

Appellants Crawford and Lucas brought tort claims against Andrew Systems and Davis, based on negligence, respondeat superior and negligent entrustment. Following Bruck v. Jim Walter Corp., 470 So.2d 1141 (Ala.1985), and Wilder v. DiPiazza, 481 So.2d 1091 (Ala.1985), the trial court severed the entrustment claim so that the same jury could hear it in a second trial. At the end of testimony in the first trial, plaintiffs moved for judgment as a matter of law on the issue of liability under respondeat superior, pursuant to Rule 50 of the Federal Rules of Civil Procedure. [FN1] The district court granted the motion. Thereafter, the jury returned verdicts of $2,250,000 in punitive damages for each of the estates of Lois Kelley and John Kelley, and $100,000 in compensatory damages for injuries to Jonathan Lucas, the minor.

FN1. Fed.R.Civ.P. 50 states in pertinent part:

(a) Judgment as a Matter of Law

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

During the second trial on the claim of negligent entrustment the court admitted additional evidence of Davis' driving record, training and habits. Andrew Systems did not move for judgment as a matter of law at the close of its case, and the court without objection submitted the issue of negligent entrustment to the jury. The court instructed the jury that it could either reconfirm its earlier verdict or modify its earlier assessment of damages either upward or downward. The jury increased its net award to $4,000,000 in punitive damages for each of the two wrongful death claims. The parties made no post-trial motions following the verdicts. After dismissing the jury, the trial court, sua sponte, set aside this second verdict for insufficient evidence, effectively reducing each of the punitive damage awards from $4,000,000 to $2,250,000.

Appellants then moved to withdraw the funds that appellees had paid into the district court pursuant to the first verdict. Appellees made no objection and the district court entered an order granting appellants' motion, noting in its order that "plaintiffs do not intend any withdrawal of funds to operate as a waiver of their right to recover any additional sums," and remarking that "the effect of any withdrawal is a matter to be determined by the appellate court." Thereafter, appellants withdrew $4,612,407.71 representing the judgment of the first verdict plus accrued interest.

[1] Andrew Systems now claims that this withdrawal of funds bars appellants from pursuing this appeal. They argue that under *1153 Alabama state law payment of a lesser amount in dispute operates as a satisfaction of a judgment. The Federal common law rule, however, leads to a different result. In United States v. Hougham, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960) reh. den. 364 U.S. 938, 81 S.Ct. 376, 5 L.Ed.2d 372 (1960), the Supreme Court applied Federal common law to the issue of accord and satisfaction stating:

> It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim.

Id. at 312, 81 S.Ct. at 16; see also United States v. F.D. Rich Co., 525 F.2d 760, 764 (7th Cir.1975); Donovan v. Penn. Shipping Co., 429 U.S.

648, 649-50, 97 S.Ct. 835, 837, 51 L.Ed.2d 112 (1977); McGowan v. King, Inc., 616 F.2d 745, 747 (5th Cir.1980); Fromson v. United States, 32 Fed.Cl. 1, 10 n. 13 (1994).

This Circuit has addressed the issue only indirectly. In Fidelcor Mortgage v. Insurance Co. of North America, 820 F.2d 367 (11th Cir.1987), this court applied the applicable Federal common law, looking to state law only to determine whether the portion of the judgment which was satisfied was distinct from the portion appealed. The court accepted the principle that when a court adjudicates separable or divisible controversies, the appealing party may accept the benefit of the divisible feature in his favor and challenge the portion adverse to him. Wynfield Inns v. Edward LeRoux Group, Inc., 896 F.2d 483, 489 (11th Cir.1990); Price v. Franklin Investment Co., 574 F.2d 594, 597 (D.C.Cir.1978); Luther v. United States, 225 F.2d 495, 497 (10th Cir.1954). [FN2]

FN2. See also Dempsey v. United States, 32 F.3d 1490 (11th Cir.1994) (Carnes, J., concurring).

In this case, there is no question that the part of the judgment appealed from is separate and distinct from the part that was satisfied, and there is no question that the amount of the first judgment is uncontested. Thus, under Federal common law, which we find to be applicable, acceptance of benefits, or the accord and satisfaction doctrine, does not bar the appeal in this case.

[2] Having decided that Crawford and Lucas are entitled to appeal, we find that they are entitled to prevail on the merits as well. Rule 50 of the Federal Rules of Civil Procedure requires that a motion for judgment as a matter of law be made prior to submission of the case to the jury. [FN3] The advisory committee's notes to Rule 50(a)(2) state that "[t]he purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." Fed.R.Civ.P. 50(a)(2) advisory committee's notes (1991 amendment).

FN3. See note 1, supra.

This court has addressed this subject in two recent cases. In Mark Seitman & Assoc. v. R.J. Reynolds Tobacco Co., 837 F.2d 1527 (11th Cir.1988), the court said:

> Although [defendant] moved for a directed verdict at the close of [plaintiff's] case, it failed to renew the motion at the close of its own case. A defendant's motion for a directed verdict at the close of the plaintiff's case will not suffice unless it is renewed at the close of all the evidence. Therefore, the district court had no authority to entertain [defendant's] motion for a judgment notwithstanding the verdict, and we are foreclosed from deciding whether the evidence was sufficient to support the verdict.

Id. at 1531 (emphasis added). In Sims' Crane Service v. Ideal Steel Products, Inc., 800 F.2d 1553 (11th Cir.1986), this court reversed the trial court's granting of defendant's motion for a judgment notwithstanding the verdict because the defendant had never moved for a directed verdict. We noted that Rule 50(b) requires that a party move for a directed verdict so that opposing counsel will not be "ambushed" or "sandbagged" regarding the sufficiency of the evidence adduced at a point in the trial proceedings when it is too late to address possible insufficiencies. The purpose of Rule 50(b), *1154 we explained, was "to avoid making a trap" out of a motion for JNOV. Id. at 1557.

In this case, although Andrew Systems never made a motion for a directed verdict either prior to the submission of the case to the jury or even after the jury returned a verdict against Andrew Systems, the district court ruled sua sponte that the evidence supporting that verdict was legally insufficient. Consequently, plaintiffs Crawford and Lucas had no notice of, and therefore no opportunity to address or cure, possible insufficiencies in the evidence. Just as we would not permit defendants who had made no previous motion to ask the court to rule on the legal sufficiency of the evidence once a verdict had been returned against them, we cannot permit the district court to so rule sua sponte.

For reasons stated in the foregoing, we hold that where defendants made no motion for a directed verdict, the district court had no authority to grant a judgment notwithstanding the verdict. We reverse the order

granting that judgment and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

49 F.3d 734 (Table)

---------- Page 1 ----------

(Cite as: 49 F.3d 734)

Lynda Crawford, Estate of Lois Vivian Parker Kelley, James Wayne Kelley, Cynthia Lucas, as Next Friend of Jonathan Lucas

v.

Andrew Systems, Inc., Dwayne Davis

NO. 94-6064

United States Court of Appeals,

Eleventh Circuit.

Feb 22, 1995

N.D.Ala., 39 F.3d 1151

DENIALS OF REHEARING EN BANC.

(The decision of the Court is referenced in an Eleventh Circuit Table of Denials of Rehearing En Banc appearing in the Federal Reporter.)

C.A.11 1995.

Crawford v. Andrew Systems, Inc.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 94-6064

D.C. Docket No. CV-93-P-840

Lynda Crawford, as Administratrix of the
Estate of Lois Vivian Parker Kelley and
James Wayne Kelley, deceased,

Plaintiff-Appellant,

CYNTHIA LUCAS as Mother and next
friend of Jonathan Lucas, a minor child,

Plaintiff,

versus

ANDREW SYSTEMS, INC., and
DWAYNE DAVIS,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama

Before CARNES and BARKETT, Circuit Judges, and JOHNSON, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgement of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further

proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the cost on appeal to be taxed by the Clerk of this Court.

Entered: December 8, 1994
For the Court: Miguel J. Cortez, Clerk

By: (Signed) Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/13/95

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LYNDA CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, Deceased, et al.

Plaintiffs;

vs. **No. CV 93--P-840-S**

ANDREW SYSTEMS, INC. and DWAYNE DAVIS,

Defendants.

JUDGMENT

On remand, it is ADJUDGED as follows:

1. The plaintiff, Lynda Crawford, as Administratrix of the Estate of Lois Vivian Parker Kelley, deceased, shall have and recover of the defendant, Andrew Systems, Inc., the principal sum of $1,750,000.00, plus $77,245.96 in interest, for a total amount of $1,827,245.96.

2. The plaintiff, Lynda Crawford, as Administratrix of the Estate of James Wayne Kelley, deceased, shall have and recover of the Defendant, Andrew Systems, Inc., the principal sum of $1,750,000.00, plus $77,245.96 in interest, for a total amount of $1,827,245.96.

3. Costs are taxed against the defendant.

This is the 29th day of March, 1995.

(Signed) Sam C. Pointer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LYNDA CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, Deceased, et al.	)	
Plaintiffs;	)	
vs.	)	**No. CV 93--P-840-S**
ANDREW SYSTEMS, INC. and DWAYNE DAVIS,	)	
Defendants.	)	

ORDER

On March 29, 1995, a judgment on remand was entered awarding the principal sum of $1,750,000 plus interest to each estate in this case. On April 18, 1995, the court held a special setting to reconsider defendant's Motion for Remittitur or New Trial and Defendant's Motion for a Hammond/Green Oil Hearing.

As a preliminary matter, the court must address its power to entertain a Rule 59 Motion in this bifurcated case. Plaintiff, as Administratrix of the two estates, measuring from the date of the original judgment--January 14, 1994--contends that Defendants' Rule 59 Motion id time-barred under Rule 59(b). However, until March 29, 1995, when judgment on Plaintiff's negligent entrustment claim was entered on remand, no judgment existed that was adverse to Defendant's interests for which a Motion for a New Trial would possibly lie. Moreover, as Plaintiff noticed her appeal on January 14, 1994, Defendant, as a practical matter, had no time to file any post-trial motions, much less ten days, because this court was stripped of its jurisdiction over the case immediately upon entry

of judgment.

Having determined that Defendant's Rule 59 Motion is timely, this court further concludes that Defendant's Motion for a New Trial is meritorious and is due to be granted. The jury verdict returned in the second trial on Plaintiff's negligent entrustment claim is clearly against the great weight of the evidence. Contrary to Plaintiff's reading of the Eleventh Circuit's opinion on remand, this court finds that the decision fails to address the substantive points made in this court's OPINION entered simultaneously with the January judgment or to reach the "merits" of whether Plaintiff produced enough evidence to maintain a negligent entrustment claim against Defendant. This court does not doubt that the substance of Plaintiff's negligent entrustment claim was dealt with at the appellate level in some form. However, the holding of the Eleventh circuit's decision is not that expansive and simply addresses the authority of a district court to enter a judgment notwithstanding the verdict doe to insufficient evidence absent a motion for a directed verdict by an opposing party ever being made.

Accordingly upon reconsideration, Defendant's Motion for Remittitur or New Trial is hereby DENIED as to remittitur and is hereby GRANTED as to the request for a new trial. Defendant's Motion for a Hammond/Green Oil Hearing is hereby DENIED. Defendant's Motion for a New Trial having been granted, the judgment on remand entered by the court on March 29, 1995, is hereby VACATED.

THIS the 12th day of April, 1995.

(Signed) Sam C. Pointer, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6332

IN RE:

LYNDA CRAWFORD, as administratrix
of the Estates of Lois Vivian Parker Kelley,
and James Wayne Kelley, deceased,

Petitioner,

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Alabama

---

BEFORE: ANDERSON, CARNES and BARKETT, Circuit Judges.

BY THE COURT:

Petitioner's petition for writ of mandamus is DENIED because Petitioner can raise the propriety of the district court's order granting Respondents a new trial as an issue on appeal should Petitioner bring an appeal of the final judgment following the new trial. Petitioner has an adequate alternative remedy, and therefore, a writ of mandamus may not issue. In re: U.S.A., 985 F.2d 540, 541 (11th Cir.) Cert. den. Faloon v. U.S.A., ____ U.S. ____, 114 S.Ct. 545, 126 L.Ed. 2d 447 (1993). Moreover, it is not clear that any judgment has been entered which Andrew desired to challenge. Fed. R. Civ. P. 58 and 59(b).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

LYNDA CRAWFORD,	)	
Plaintiff(s);	)	
	)	
vs.	)	**No. CV93-P-00840-S**
	)	
ANDREW SYSTEMS, INC.,	)	
Defendant(s).	)	

OPINION

After this Court granted a new trial on April 12, 1995, Andrew Systems, Inc. Filed a motion for summary judgment arguing that Crawford has failed to show any issue of material fact that supports a finding of negligent entrustment. After hearing oral argument on September 7, 1995 and taking the matter under submission, this Court finds that Andrew Systems is entitled to judgment as a matter of law.

FACTS

Dwayne Davis was an employee of Andrew Systems, Inc., whose duties included towing a trailer behind a van, a task he had done successfully on earlier occasions. In September 1992, Davis was involved in an accident which resulted in the death of Lois and James Kelley and their grandson Jonathan Lucas. Because Davis improperly hitched a trailer to his van, the trailer separated from the van, crossed the median on the highway, and struck the Kelleys' car. After a jury trial in January 1994, Crawford, the Administratrix of the Kelleys' estate, was awarded $4.6 million in damages due to the negligence of Davis. Under the doctrine of respondeat superior, Andrew Systems was found to be vicariously liable and satisfied the judgment. This current litigation was bifurcated from the first matter, and Crawford now seeks recovery of additional punitive damages from Andrew Systems based on negligent entrustment, alleging that the company knew or should have known that Davis was incompetent to hitch a trailer.

Davis recently provided an affidavit to Crawford in which he recounted one incident prior to the accident in which he improperly attached a trailer, and two of his supervisors witnessed it come unhitched and roll down a hill. He also recounted one incident where another supervisor observed his difficulty backing the trailer in order to park it.[1]

ANALYSIS

To establish a claim for negligent entrustment, Crawford must show: "(1) an entrustment; (2) to an incompetent; (3) with knowledge that he is incompetent; (4) proximate cause; and damages." Dunaway v. King, 510 So.2d 543, 545 (Ala. 1987). The parties dispute the second and third elements, whether Davis was incompetent to hitch a trailer and if so, whether Andrew Systems knew this. Assuming (without deciding) that Davis was incompetent, "to succeed under a cause of action for negligent entrustment, however, a plaintiff must prove that the entruster knew or had reason to know of the entrustee's incompetent condition or proclivities." Liao v. Harry's Bar, 574 So.2d 775, 780 (Ala. 1990).

In Alabama, a plaintiff must show the entruster's knowledge of the entrustee's incompetence by either 1) notice of prior acts of incompetency of a similar nature to the conduct at issue or 2) general incompetency from which a jury can infer constructive knowledge. See Thompson v. Havard, 235 So.2d 853, 857 (Ala. 1970). Specifically, the Alabama Supreme Court has stated:

> It is incumbent on the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge tot the master, in the exercise of due care must have had them brought to his notice. While such specific acts of alleged incompetency

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1. Davis' affidavit also states "I am not now nor have I ever been competent to hitch and tow trailers and my supervisors were aware of this prior to the crash in September, 1992." As Davis can only testify to matters of which he has personal knowledge, this conclusory statement plays no part in the determination of Andrew systems' knowledge of Davis' incompetency. This decision is reflected in the ruling granting in part the Defendant's Motion to Strike Affidavit entered on September 11, 1995.

> cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come o his knowledge, had he exercised ordinary care.

235 So.2d at 858. While not called upon to define the precise number of incompetent prior acts required to give notice to the entruster, it is clear from the Thompson Court's use of the plural that knowledge of one prior act of improper attachment of a trailer is insufficient.

Turning to the facts of this case, Davis claims his employers witnessed only one other occasion in which he incorrectly hitched a trailer. This incident is insufficient to put Davis' employers on notice that he was *incompetent* to hitch a trailer, particularly in light of the fact that he has successfully hitched his trailer on other occasions. Davis also alleges an incident in which a supervisor saw him having difficulty parking a truck. The latter instance only if coupled with other repeated acts of carelessness, might suggest a general incompetence to handle a truck and trailer, but does not provide evidence of a second specific act of incompetence in hitching a truck.

For these reasons, Defendant's Motion for Summary Judgment should be granted, and the remaining claims in this case should be dismissed in their entirety with prejudice.[2]

Dated: October 5, 1995

(Signed) Sam C. Pointer, Jr.
Chief Judge Sam C. Pointer, Jr.

---

2. Crawford's insistence that her claims for negligent supervision, hiring, and training are still pending is without merit. The Supreme Court of Alabama allows for bifurcation of a negligent entrustment claim from other negligence causes of action, because evidence of prior bad acts is necessary in a negligent entrustment case, but may be more prejudicial than probative when considering other tort claims. See Wilder v. DiPiazza, 481 So.2d 1091, 1092 (Ala. 1985); Bruck v. Jim Walter Corp., 470 so.2d 1141, 1143 (Ala. 1985). Trial judges generally have broad discretion to order separate trials. Robinson v. Computer Servicenters, Inc., 360 So.2d 299 (Ala. 1978). This Court entered a ruling on January 14, 1995 regarding Defendant's Motion in Limine, which severed only the negligent entrustment claim for a separate trial. The damages recovered from the first trial fully compensated Crawford for all of her other claims.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

LYNDA CRAWFORD,	)	
Plaintiff(s);	)	
	)	
vs.	)	**No. CV93-P-00840-S**
	)	
ANDREW SYSTEMS, INC.,	)	
Defendant(s).	)	

ORDER

For the reasons expressed in the accompanying opinion, Defendant's Motion for Summary Judgment is hereby GRANTED. The remaining claims in this case are DISMISSED with prejudice. Costs have previously been taxed against Defendants.

Dated: October 5, 1995

(Signed) Sam C. Pointer, Jr.
Chief Judge Sam C. Pointer, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

LYNDA CRAWFORD, Plaintiff(s);	)	
vs.	)	No. CV93-P-00840-S
ANDREW SYSTEMS, INC., Defendant(s).	)	

ORDER

Plaintiff filed a Motion for Reconsideration of the Order granting defendants' Motion for Summary judgment. In support of the Plaintiff's motion she filed numerous affidavits and depositions. These filings are redundant and merely provide further testimony about the incidents already considered by this court during the original trial in January of 1994 and the motion for summary judgment. For this reason, the Motion for Reconsideration is hereby DENIED. Alternatively, the affidavits filed by Plaintiff were untimely. This court took this matter under submission after hearing argument by the parties on September 7, 1995, and based the decision on the materials presented at that time. The Plaintiff has not demonstrated excusable neglect pursuant to FRCP 6(b), and this court has discretion to refuse to accept these out-of-time affidavits. Useden v. Acker, 947 F.2d 1563, 1571 (11th Cir. 1991).

Plaintiff further asks for reconsideration of the ruling that the trial and the summary judgment disposed of all of the claims in this case, including the negligent supervision, hiring, and training claims. The original trial was bifurcated solely so the claim of negligent entrustment would be heard separately as it would involve evidence of Davis' incompetence which might prejudice the consideration of the other claims. This request for reconsideration is also DENIED.

Finally, the testimony presented in Davis' affidavit which was not based upon his personal knowledge was properly stricken, specifically, his

final conclusion that his employers were aware of his alleged incompetence. The remainder of the affidavit was considered in full. The request to reconsider striking this sentence of the affidavit is hereby DENIED.

Dated: December 11, 1995.

(Signed) Sam C. Pointer, Jr.
Chief Judge Sam C. Pointer, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LYNDA CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, Deceased, et al.

Plaintiffs;

vs.

No. CV 93--P-840-S

ANDREW SYSTEMS, INC. and DWAYNE DAVIS,

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Lynda Crawford, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, Deceased, Plaintiff, above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Orders entered in this action on October 5, 1995, and December 11, 1995, denying Plaintiff's Motion to Reconsider, to the extent that said Motion to Reconsider involved issues presented after judgment.

(Signed) Glenda G. Cochran
417-78-5150

January 8, 1996
OF COUNSEL:
COCHRAN AND ASSOCIATES
305 Park Place Tower
Birmingham, Alabama 35203

Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

119 F.3d 925
38 Fed.R.Serv.3d 417, 11 Fla. L. Weekly Fed. C 331
(Cite as: 119 F.3d 925)

Lynda CRAWFORD, as Administratrix of the Estates of Lois Vivian Parker Kelley and James Wayne Kelley, deceased, Plaintiff-Appellant,
Cynthia Lucas, as Mother and next friend of Jonathon Lucas, a minor child,
Plaintiff,
v.
ANDREW SYSTEMS, INC., Dwayne Davis, Defendants-Appellees.
No. 96-6060.
United States Court of Appeals,
Eleventh Circuit.
Aug. 15, 1997.

Action was brought against driver and employer for deaths and personal injuries caused by motor vehicle accident. After remand, 39 F.3d 1151, the United States District Court for the Northern District of Alabama, No. 93-P- 840-S, Sam C. Pointer, Jr., J., granted employer's motion for new trial on negligent entrustment claim, and thereafter entered summary judgment for employer. Appeals were taken. The Court of Appeals held that period for filing motion for new trial began to run when district court entered valid judgment on remand.
Affirmed.

FEDERAL CIVIL PROCEDURE k2366.1
170Ak2366.1
When Court of Appeals reversed judgment on ground that it was unauthorized, case was left without a judgment until district court, on remand, entered one that was authorized by law, and only then did period for filing motion for new trial begin to run.
Fed.Rules Civ.Proc.Rule 59(b), 28 U.S.C.A.

FEDERAL COURTS k933

170Bk933
When Court of Appeals reversed judgment on ground that it was unauthorized, case was left without a judgment until district court, on remand, entered one that was authorized by law, and only then did period for filing motion for new trial begin to run.
Fed.Rules Civ.Proc.Rule 59(b), 28 U.S.C.A.

*925 Glenda G. Cochran, Cochran & Associates, Birmingham, AL, for Plaintiff-Appellant and Plaintiff.
Charles E. Sharp, Turner B. Williams, J. Clinton Pittman, Sadler, Sullivan, Sharp, Fishburne & Van Tassel, Birmingham, AL, for Defendants-Appellees.
Appeal from the United States District Court for the Northern District of Alabama.

Before BLACK, Circuit Judge, RONEY, Senior Circuit Judge, and BURNS [FN*], Senior District Judge.

FN* Honorable James M. Burns, Senior U.S. District Judge for the District of Oregon, sitting by designation.

PER CURIAM:
Appellant challenges the district court's holding that an unauthorized judgment does not start the clock for a Rule 59(b) motion for *926 new trial. We hold that the 10-day period contemplated by Rule 59(b) does not begin to run until after the entry of a valid judgment and affirm the district court. [FN1]

FN1. After carefully considering the other issues raised on appeal, we affirm the district court's grant of summary judgment.
See 11th Cir. Rule 36-1.

I. BACKGROUND

Dwayne Davis was driving a van on an interstate highway while towing an empty flat-bed trailer. The trailer separated from the van, crossed the median, and struck a vehicle traveling in the opposite direction. That automobile was occupied by Lois and Wayne Kelley and their infant

grandson, Jonathon Lucas. The collision killed the Kelleys and injured Jonathon. Lynda Crawford, Administratrix of the Kelleys' estates, and Cynthia Lucas, Jonathon's mother, sued under Alabama state law to recover for the injuries inflicted. Specifically, Crawford and Lucas brought tort claims against Davis and his employer, Andrew Systems, Inc. (Andrew Systems), based on negligence, respondeat superior, and negligent entrustment. The trial court severed the negligent entrustment claim so that the same jury could hear it in a second trial. Pursuant to Rule 50 of the Federal Rules of Civil Procedure, at the end of the testimony in the first trial, Crawford and Lucas moved for judgment as a matter of law on the issue of liability under respondeat superior. The district court granted the motion. Thereafter, the jury returned verdicts in favor of the plaintiffs, awarding the estates of Lois Kelley and John Kelley $2,250,000 each in punitive damages and Jonathon Lucas $100,000 in compensatory damages.

During the trial on the claim of negligent entrustment, the court admitted additional evidence of Davis' driving record, training, and habits. Andrew Systems did not move for judgment as a matter of law at the close of its case, and the court submitted the issue of negligent entrustment to the jury without objection. The court instructed the jury that it could either reconfirm its earlier verdict or adjust its earlier assessment of damages. The jury elected to increase its punitive damage award on each of the two wrongful death claims to $4,000,000. The parties made no post-trial motions at that time. After dismissing the jury, the trial court, sua sponte, set aside this second verdict for insufficient evidence, effectively reducing each of the punitive damage
awards from $4,000,000 to $2,250,000.

In accordance with the district court's ruling, Andrew Systems paid the judgment and appellants withdrew $4,612,407.71, representing the judgment of the first verdict plus accrued interest. Appellants appealed to this Court, maintaining that the district court lacked the authority to sua sponte set aside the second verdict for insufficient evidence. This Court agreed and "reverse[d] the order granting that judgment and remand[ed] the case for further proceedings." See Crawford v. Andrew Systems, Inc., 39 F.3d 1151, 1154 (11th Cir.1994).

Within 10 days of the entry of judgment on remand, Andrew Systems filed a motion for a new trial on the negligent entrustment claim. The trial court granted that motion. Andrew Systems then moved

for summary judgment on the negligent entrustment claim.
The trial court granted that motion as well. The present appeal concerns only the negligent entrustment claim on which the court granted summary judgment after remand.

II. ANALYSIS

Appellants argue that the Appellee's motion for a new trial was time barred under Rule 59(b). They maintain that the pre-appeal judgment of the district court was not void, and, even if it were, time runs from all judgments, whether void or not. We find this argument unpersuasive. It is clear from this Court's decision in Crawford that the district court's initial judgment was unauthorized. See id. at 1154 (the district court "had no authority to grant a judgment notwithstanding a verdict"). We think it self-evident that when a court of appeals reverses a judgment on the ground that it was unauthorized, the case is left without a judgment until the district court enters one that is authorized by the law.

*927 Under Rule 59(b), "[a]ny motion for new trial shall be filed no later than 10 days after entry of the judgment." Fed.R.Civ.P. 59(b). This Court voided the original judgment entered on January 14, 1994. As a result, no valid judgment existed on Appellant's negligent entrustment claim until the district court entered judgment on remand. The latter judgment--the first valid judgment entered by the district court--triggered the Rule 59(b) clock. The district court entered that judgment on March 29, 1995. Accordingly, when Andrew Systems filed its successful motion for new trial on March 31, 1995, it was within the 10-day period provided for by Rule 59(b). [FN2]

FN2. We note that until the March 29, 1995, judgment was entered, no judgment existed that was adverse to Andrew Systems' interests. Thus, as a practical matter, there was no reason for Andrew Systems to file a motion for new trial until the judgment was entered on remand.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 96-6060

D.C. Docket No. 93-P-840-S

Lynda Crawford, as Administratrix of the
Estate of Lois Vivian Parker Kelley and
James Wayne Kelley, deceased,

Plaintiff-Appellant,

CYNTHIA LUCAS as Mother and next
friend of Jonathan Lucas, a minor child,

Plaintiff,

versus

ANDREW SYSTEMS, INC., and
DWAYNE DAVIS,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ___F.2d___).

Before: BLACK, Circuit Judge, RONEY, Senior Circuit Judge, and BURNS*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel or other Judge in regular active service onthe Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

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*Honorable James M. Burns, Senior U.S. District Judge for the District of Oregon, sitting by designation.

ENTERED FOR THE COURT:

(Signed) Susan Black
UNITED STATES CIRCUIT JUDGE
[Filed: OCTOBER 27, 1997.]

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Before BLACK, Circuit Judge, RONEY, Senior Circuit Judge, and BURNS*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that each party bear their own costs on appeal.

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*Honorable James M. Burns, Senior U.S. District Judge for the District of Oregon, sitting by designation.

Entered: August 15, 1997
For the Court: Miguel J. Cortez. Clerk

By: (signed) Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 11/4/97